

FINANCIAL TIMES

Eagles and vultures

BP As the energy group battles to cap the Macondo well, it also has to contend with a vast range of legal claims that, while still unquantifiable, are on course to reach tens of billions of dollars, writes **Michael Peel**

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A Mississippi law firm's electronic billboard touts for business from those affected by the Gulf of Mexico leak. Criminal and civil investigations have been launched by the US government in addition to an array of actions by shareholders as well as locals

Tony Buzbee, owner of The Buzbee Law Firm in Houston, Texas, has more than a thousand clients with one common goal: to extract money from BP over the [Gulf of Mexico disaster](#).

They include 18 men who were injured in the explosion on the Deepwater Horizon rig, one of whom suffered 60 per cent burns. Others, such as fishermen, allege their livelihoods have been directly undermined by the spill. Still more, ranging from suntan lotion sellers to a Florida hotel owner, say they are victims of the knock-on impact of a catastrophe President Barack Obama has described as an “environmental 9/11”.

Mr Buzbee – whose firm's motto is “When winning is the only option” – says he is sure of just one thing: the bill facing BP is going to be very large indeed. “There has been a wide-ranging impact on the economies of these areas that are already affected or are predicted to be affected,”

he says. “At the end of the day, there will be five or six law firms that will have tens of thousands of cases that will lead the litigation.”

Ever since the rig exploded on April 20 and oil spewed in large volumes into the Gulf of Mexico, plaintiff lawyers, corporate defence attorneys and law enforcement experts have all been trying to work out what the cost of criminal and civil fines, shareholder litigation, the [clean-up](#) and lawsuits from local people and businesses will be to the company.

The case has some parallels in its size and scope with a number of notorious past corporate litigations – such as those involving big tobacco, the tanker Exxon Valdez and Merck’s Vioxx drug. But Paul Cereghini, a corporate defence specialist at Bowman and Brooke, a Minneapolis law firm, says the sheer range of legal action against BP will probably “put this in a different category all by itself”. He says: “I think at some point the scale of the litigation becomes so large that it really is novel. Now, what this scale is is certainly hard to define – because the problem is continuing to expand and become more complicated.”

BP has declined to comment on pending litigation against it and did not respond to a request for an interview with its legal team.

Among the most serious claims facing the company – both in financial and reputational terms – lie in the criminal and civil investigations launched by the US government. There are a range of laws that prosecutors could use against BP, including the Refuse Act, the Endangered Species Act and the Migratory Bird Treaty Act. The bird law is popular with prosecutors, environmental law experts say, because the large number of animals affected make it a useful tool for varying the level of the fine.

These penalties can be augmented by the Alternative Fines Act, while BP might face still higher fines because of previous US legal problems over the 2005 Texas City refinery explosions and the 2006 Prudhoe Bay oil leak in Alaska.

Environmental law experts say both the area covered by the Deepwater Horizon pollution and its timing make its impact worse than that of the 1989 Exxon Valdez sinking off Alaska. Jane Barrett, director of the Environmental Law Clinic at the University of Maryland School of Law, says: “It’s a horrible, horrible time for it to happen, because of the spawning and nesting season. If I am the government, I am going to look not just at the critters that have died, many of whom have sunk, but to try to capture the cost of losing a whole . . . mating season.”

Then there is the cost of the clean-up itself, which BP says has reached \$2.65bn (€1.1bn, £1.8bn). Gregory Evans, a California-based environmental litigation lawyer, captures the range of potential liabilities when he says these concern “all that flies in the air, all that swims in the sea, all that might occupy the land”. The great challenge, for regulators as well as the company, he says, is “trying to figure the cost of the clean-up without knowing the extent of the damage”.

Big corporate legal pay-outs

\$206bn	Master tobacco settlement agreement (1998) Staged 25-year payment agreed by cigarette manufacturers to cover US states' smoking-related health costs
\$7.2bn	Enron (2006) Pay-out secured by investors from company and its advisers following the fraud that drove it into bankruptcy
\$6.2bn	WorldCom (2004-05) Damages won by shareholders after another fraud-related corporate bankruptcy
\$4.9bn	Merck (2007) Settlement agreed to end most of tens of thousands of lawsuits alleging the drug Vioxx caused heart attacks and strokes
\$5.0bn later cut to \$507m	ExxonMobil (1994-2008) Compensation for tens of thousands whose livelihoods were affected by the Exxon Valdez oil spill

Source: Lawinfo.com

Most severe of all in its monetary impact on BP may be the Clean Water Act, under which the company could be fined up to \$4,300 for each barrel of oil discharged. Even based on assumptions that the leak averages an apparently conservative 20,000 barrels a day and is capped in August as planned, BP would have a possible exposure of more than \$10bn. Like other laws potentially in the purview of the criminal investigation, the Clean Water Act could be used to prosecute individuals, although experts say this is more likely to be applied to managers who were directly involved rather than top executives.

Albert Lin, a professor at the University of California and former attorney for the environment and natural resources division of

the Department of Justice, says that while the environmental penalties facing BP are not new, the size of them is. "You are probably going to see record amounts out of this," he says.

As the official probes gather pace on one legal track, BP will simultaneously face huge numbers of private lawsuits. In financial terms, damages relating to the 11 dead Deepwater Horizon workers and those who were injured are likely to be only a small part of the total. Anyone who has lost out has a possible claim, from seafood restaurateurs to the condominium owner who claims potential buyers have been put off by the pollution.

Some of these will be dealt with by a BP-financed [\\$20bn compensation fund](#), but plaintiff lawyers say a good number are likely to end up in court. That would trigger myriad tussles over whether the damage suffered by claimants is sufficiently direct to justify compensation and, if it is, what the restitution should be. Lawyers do not envy BP if it has to argue its case before juries in Louisiana or any other of the states that have suffered.

Legal experts say the situation is likely to be complicated further because the variety of probable cases means it will be hard to aggregate them into so-called class actions in which investors with a shared interest group together. This means BP may struggle to achieve what ExxonMobil did in the Valdez case and fight its opponents in one combined piece of "super-litigation". Instead, BP is likely to face numerous cases in multiple states, each with its own particular circumstances, with the possibility of many tussles over jurisdiction.

While BP fights angry fisherman in one part of the legal system, it is likely to be having contrasting but equally tough battles with institutional shareholders in another set of courtrooms. Shareholder lawsuits have historically been successful and lucrative in past US cases of corporate wrongdoing – the collapse of Enron, the fraud-ridden energy trader, generated a \$7.2bn pay-out for shareholder class action plaintiffs (and a cool \$688m for the lawyers).

[Claimants](#) in BP will focus on the halving in the company's [share price](#) since the rig explosion – a loss of more than £60bn (\$90bn, €73bn) in market value. The prospect of huge liabilities hitting BP has also brought downgrades in its credit rating. Its bonds have fallen sharply and the price of its credit default swaps – the cost of insuring the company's debt against default – has risen to levels typically associated with companies rated as “junk”.

Stopping the leak and cleaning up the oil is expected by analysts to cost only about \$8bn; the remainder of the cost to BP would represent claims for damages, fines and other penalties.

The shares are very volatile, hitting a 14-year low last week before rallying by 8 per cent so far this week. Richard Griffith of Evolution Securities says: “People just don't want to take a risk until the relief wells hit and the well is plugged. But then the uncertainty will be over who owes who for what.”

The [New York state pension fund](#) has alleged BP misled it over its safety record and ability to deal with large spills – although it and other potential class action plaintiffs were dealt a blow last week by a US Supreme Court ruling limiting the rights of shareholders in foreign companies to sue in American courts.

Against this formidable legal tide, BP has few options except to fight where it can and try to spread the pain a bit among other defendants, legal experts say. Already it is in dispute with Anadarko, 25 per cent owner of the leaking Macondo well, which has accused it of “gross negligence”. Other companies whose roles plaintiff lawyers are examining are Mitsui & Co, the Japanese trading house that owns 10 per cent of Macondo, as well as two US groups: Transocean, the Deepwater Horizon's owner, and Halliburton, a contractor.

More fundamentally, BP faces a tension familiar to many companies that have presided over a disaster affecting large numbers of people and swaths of territory. While it must appear to be both responsible and responsive to legitimate claims, it will want to contest cases where it thinks allegations are spurious. It will not be lost on the company's lawyers that ExxonMobil fought the Valdez case for two decades, taking some of the emotional sting out of it and eventually having a \$5bn punitive damages award cut by 90 per cent on appeal.

The Valdez example and the particular characteristics of the BP case mean it is futile – or disingenuous – for anyone to claim now to know the company's likely liabilities, lawyers say. The only near-certainty – given the compensation fund the company has established – is that the total liabilities will run into the tens of billions of dollars, putting it somewhere between the estimated \$4bn Valdez costs and the hundreds of billions in cases involving tobacco and asbestos.

Back in Houston, Mr Buzbee says no previous spill gives much of a yardstick for the Deepwater Horizon case. His clients and others are in the first stages of a journey towards finding out just how much the disaster will cost what was just months ago one of the world's leading companies.

Mr Buzbee says: “We have no way to put this in historical context – because we have never faced anything like this before. There is simply no way to know how long they are going to have to continue to pay for this.”

COMPENSATION ACCOUNT			
The \$20bn downpayment on which BP is banking to limit lawsuits			
<p>One of the few potential curbs on BP’s overall legal liability is the \$20bn compensation fund that the company has agreed to finance under pressure from the White House, experts say.</p>	<p>the huge number of small Gulf of Mexico claims BP is likely to face – provided people are persuaded it is better for them to apply for funds from the account than go to court.</p>	<p>who claim during the Macondo well leak or the weeks after it is finally capped – would have to waive the right to launch private lawsuits against BP.</p>	<p>On the other hand, legal experts argue that larger, more sophisticated claims – those from big property owners or tourism businesses, say – are more likely to end up in court. They will be less suited to the discretionary fund because of the likely debate over the size of the damages and the subtle legal arguments in play, such as the extent to which economic losses are attributable to the spill and the degree to which they reflect the recession and other factors.</p>
<p>The company’s willingness to make such a big cash downpayment is a sign of both the scale of its potential legal losses and of its fears that the alternative could be an even larger hit in damages and fees from protracted lawsuits.</p>	<p>The fund’s biggest attraction to claimants – stressed by Kenneth Feinberg, the Washington lawyer heading it – is that it offers the chance of a pay-out without the time, expense and risk of a court case.</p>	<p>Lawyers say the fund’s terms mean it will probably be most attractive for simpler and smaller allegations of damage caused directly by the disaster, such as those by fishermen unable to work. As all or most of the revenue lost can be attributed to the spill, such claims will tend to be relatively easy to adjudicate and simple to cost.</p>	
<p>Lawyers say the fund could help limit</p>	<p>In return, all but what Mr Feinberg calls “emergency” applicants – those</p>		

AN UNKNOWN QUANTITY

BP’s final liabilities will depend on how much oil is spilt – but that figure is unknown. If the relief wells drilled to allow the Macondo well to be plugged with cement work as planned, the flow will be stopped in August, up to four months after oil started to escape following the explosion on the Deepwater Horizon drilling rig. Even when the duration is known, however, the volume will be uncertain because estimates of the flow rate vary widely. The US government has settled on a figure of about 35,000 barrels a day – about as much oil as America uses in two and a half minutes – but says it could be 60,000 b/d. The flow may have increased over time, as the oil has cleared itself a path and obstructions at the wellhead have been removed to allow a containment cap to be fitted.

Additional reporting by Ed Crooks